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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 UNITED STATES OF AMERICA,) No. CR 16-00440 WHA
15)
Plaintiff,) **UNITED STATES' MOTION IN LIMINE NO.**
16) **FIVE RE PRESENTATION OF UNNOTICED**
v.) **AFFIRMATIVE OR LEGAL DEFENSES TO**
17) **THE JURY WHERE BURDEN IS ON DEFENSE**
YEVGENIY ALEXANDROVICH NIKULIN,) **TO PROFFER FOUNDATION TO THE COURT.**
18)
Defendant.) Trial: March 9, 2020
19) Pretrial Conference: February 19, 2020
20) Time: 1:30 p.m.
21) Courtroom No. 12

22 **I. INTRODUCTION**

23 Under the scheduling order entered in this case, the deadline for defense reciprocal disclosures
24 under Fed. R. Crim. P. 16(b) and for notices of defenses under Fed. R. 12.1 and 12.2 was January 15,
25 2020. ECF No. 121. On that date, defendant filed a witness list indicating one potential witness, a
26 proposed expert digital forensics examiner. ECF No. 134. Defendant also filed an exhibit list indicating
27 that he does not presently have any exhibits that he intends to introduce at trial. ECF No. 135.
28 Defendant has not noticed an affirmative defense of any kind. The government therefore moves

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1 preemptively to exclude any eleventh-hour propounding of such a defense.

2 **III. ARGUMENT**

3 The initial burden of demonstrating an affirmative defense rests with the defense. *See United*
 4 *States v. Sotelo-Murillo*, 887 F.2d 176, 178 (9th Cir. 1989) (noting that defendant is only entitled to jury
 5 instruction on a legal defense to the charge against him “which has some foundation in the evidence”).
 6 In the government’s view, there is no evidence in this case that would support any affirmative defense,
 7 such as alleged duress, alibi, entrapment, or insanity. If the defendant disagrees, it is his burden to
 8 proffer some foundation for such a defense before it is presented at trial. The government has been
 9 asking for such notice since it began producing discovery, and the Court set a clear deadline for notice.
 10 Given that the deadline has passed, and the defendant has proffered nothing, the government respectfully
 11 requests that the Court enter an order precluding presentation of any unnoticed defense. Otherwise,
 12 there is a risk that defense counsel will argue potential defenses that were never noticed and are not
 13 reasonably anticipated to be supported by evidence, which would be improper and misleading to the
 14 jury.

15 Relatedly, to the extent that defendant seeks to admit evidence at trial, which was not previously
 16 produced, the government will ask that this Court exclude it. *See United States v. Scholl*, 166 F.3d 964,
 17 972 (9th Cir. 1999) (upholding district court’s decision to exclude defense evidence due to defendant’s
 18 strategic decision to withhold discovery until the last minute)

19 **IV. CONCLUSION**

20 The United States therefore moves *in limine* for an order excluding any unnoticed affirmative
 21 defenses.

22 DATED: January 22, 2020

Respectfully submitted,

23 DAVID L. ANDERSON
 24 United States Attorney

25 /s/
 26 MICHELLE J. KANE
 27 KATHERINE WAWRZYNIAK
 28 Assistant United States Attorney